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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION AND THOMAS WASSELL,
Appellants,

vs.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION

This brief is submitted in response to the brief for the appellee and to the brief for the Attorney General of the State of Georgia, as *amicus curiae*, in support of appellee.

The appellants respectfully apologize for the length of this Reply Brief. However, the appellants respectfully submit that it may be of assistance to the Court to endeavor to respond to the contentions of the appellee, particularly in light of the two decisions rendered by this Court since the filing of the Brief of the Appellants.[1]

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1. Miami Herald Publishing Co. v. Tornillo, ___ U.S. ___, 94 S.Ct. 2831 (1974); Gertz v. Robert Welch, Inc., ___ U.S. ___, 94 S.Ct. 2997 (1974).

I.

PRELIMINARY REBUTTAL

A careful review of the arguments and authorities advanced in support of the appellee's position demonstrates that the appellee's contentions are not supported by and are directly contrary to the controlling decisions of this Court.

(A)

The Appellee Asserts That This Court Lacks Jurisdiction Of The Appeal.[2]

However, the decisions of this Court establish that the requirements of "finality" are satisfied where, as here, the highest state court has ruled upon the constitutional question[3] and the only remaining issues concern the application of state law. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). This policy has been particularly emphasized in cases where the constitutional ruling of the state court raised important questions regarding the freedom of the press under the First Amendment. *Miami Herald Publishing Company* v. *Tornillo, supra; Mills* v. *Alabama*, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 (1971).[4]

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2. Brief of Appellee, pp. 4-9.

3. Appendix to Jurisdictional Statement, A. 24-26.

4. A more extensive discussion of this point of rebuttal is contained in Section II of this Reply Brief at p. 8, *infra*.

(B)

The Appellee Argues That The Appellants Have Violated His First Amendment Right To Privacy.[5]

However, the appellee has overlooked the fundamental principle of constitutional law that to whatever extent the First Amendment secures a "right of privacy," to the appellee, that protection extends only against those exercising the *power of the government* to invade his privacy. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964). The decisions of this Court cited by the appellee, *e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965), assure the privacy of the individual against *governmental* intrusion.

> ". . . The First Amendment has a penumbra where privacy is protected from *governmental* intrusion." *Griswold* v. *Connecticut*, 381 U.S. at 483 (emphasis supplied).

The appellants, a private newsman and the television station which employed him, exercised no such governmental power in broadcasting their truthful report of the public court proceedings of which the appellee now complains. Moreover, both parties and the *amici curiae* have agreed that this case is controlled by this Court's earlier holdings that the freedoms of speech and of the press guarantee the liberty to discuss publicly and truthfully all matters of public interest and concern. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).[6]

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5. Brief of Appellee, p. 22; Brief of State of Georgia, p. 13.

6. A more extensive discussion of this point of rebuttal is contained in Section III of this Reply Brief at p. 15, *infra*.

(C)

In Support Of Georgia Code Ann. Section 24-9901, The State Of Georgia And The Appellee Argue That The Government May Properly Establish Guidelines As To What Will And What Will Not Be "Deemed" A Matter Of "Legitimate Public Interest."[7]

However, this Court recently rejected just such a claim by the State of Florida in *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974):

> ". . . *The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.* A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size of the paper, and content, *and treatment of public issues and public officials*—whether fair or unfair—constitutes the exercise of editorial control and judgment. *It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.*" ..... U.S. at ....., 94 S.Ct. at 2839-40 (emphasis supplied.)

Freedom of the press requires that the editor be free to determine what subjects, issues and facts are of public interest within the context of his audience. As long as his publication is truthful, the editor's determination as to the public interest should be reviewable, if at all, only for clear abuse of his constitutional discretion. *Miami Herald Publishing Co.* v. *Tornillo, supra.*[8]

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7. Brief of Appellee, p. 21; Brief of State of Georgia, p. 20.

8. A more extensive discussion of this point of rebuttal is contained in Section IV of this Reply Brief, p. 23, *infra.*

(D)

The Appellee Asserts That The Appellants' Publication Of The Name Of The Victim In The Course Of Their Broadcast News Coverage Of The Public Trial Was An Embarrassing "Private" Fact Not Of Public Interest.[9]

However, it is clear from the record that at the time of the broadcast the name of the murder-rape victim was not a "private fact," but was instead a matter of public record. The victim's name was contained in the indictment (A. 23, 25) and was a part of the public court proceedings held during the arraignment and sentencing of the various defendants who pleaded guilty. (A. 17-18.)

The appellee asserts that the name of the victim is not a matter in which the public has a "legitimate" interest.[10] Although the appellants challenge the appellee's arbitrary concept of "legitimate" public interest,[11] it is apparent on the facts and record that the publication of the victim's name in the present case was of clear public interest:

> (1) The public has a legitimate interest in seeing that those accused of the rape and murder of Cindy Cohn are fully prosecuted. The public is entitled to know all the facts which surround the exercise of the prosecutor's discretion to drop the murder charges and recommend light sentences in this particular case. Hence, the victim's name identified the particular prosecution.

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9. Brief of Appellee, p. 10.

10. Brief of Appellee, pp. 18-20.

11. "The issue is not whether the public, or a segment thereof, is curious, or desires to know something, but rather, whether the public has any legitimate concern to justify the intrusion into a person's life." Brief of Appellee, p. 19.

(2) The public has a legitimate interest in knowing all of the circumstances surrounding the crime and the subsequent prosecution. This information is essential for the public to understand the dangers to which they and their children are exposed and to determine what social and political actions may be necessary for their protection. The victim's identity is one of the facts which convey information to a portion of the public concerning the relationship of the victim to those accused of the crime. The victim's character and her social, economic and educational background are all relevant facts uniquely associated with her name or identity.

(3) The use of the victim's name serves the public interest in advising potential witnesses who may be unknown or unaware of the prosecution to come forward for either the prosecution or the defense. The public has a legitimate interest in seeing that a criminal prosecution is conducted in a fair and vigorous manner.

The appellee carefully excludes from his definition of "legitimate public interest" the public's desire to know all of the facts surrounding the crime, including the name of the victim.[12] However, the *Restatement (Second) of Torts* (Tent. Draft No. 13, 1967) from which the appellee takes his definition of "legitimate" public interest specifically recognizes the importance of the public "curiosity" in defining the publisher's privilege:

". . . [T]hose who are the victims of crime, or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes

12. Brief of Appellee, pp. 18-19.

or accidents, or . . . other events which attract public attention . . . *are subject to the privilege which publishers have to satisfy the curiosity of the public as to its heroes, leaders, villains and victims,* and those who are closely associated with them." *Restatement (Second) of Torts*, §652F, Comment *d*, at 128 (emphasis added).

The appellee also admits the accuracy of the saying that "names are news," but dismisses this fundamental journalistic principle as a "commercial fact" unrelated to the narrow constitutional issue which he would draw.[13]

(E)

The Appellee Argues That Georgia Code Ann. Section 26-9901 Is A Constitutional Restraint On The Press Justified By The Social Interests In Prohibiting The Publication Of The Name Of The Rape Victim.

However, the appellee fails to demonstrate how the statute's clear overbreadth can be reconciled with the constitutional discretion of the editor, *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831, 2840 (1974), or with the acknowledged rule that criminal court proceedings are public events which may be fully reported, *Craig* v. *Harney*, 331 U.S. 367, 374 (1947).

The appellee overlooks the fact that neither the "social values" urged in support of the statute are served by the application of the prohibition to the present case where the victim died at the time of the assault:

(1) The victim can no longer be protected from publicity;

13. Brief of Appellee, p. 25. A more extensive discussion of this point of rebuttal is contained in Sections V(A) and (B) of this Reply Brief, pp. 29-37, *infra*.

(2) Nor can the victim be encouraged to report the crime or assist in the prosecution as a witness.

Indeed, *prior* to the publication of the victim's name by these appellants, the prosecutor had dropped the murder charges against all defendants, agreed to pleas of guilty to the lesser charges of rape and attempted rape, and recommended light sentences.[14]

The argument that Ga. Code Ann. §26-9901 is similar to the statutory protections afforded juvenile court proceedings is equally unfounded.[15] The juvenile statutes restrict the access of the public and the press to the juvenile court records and proceedings.

However, there is no issue in this case concerning the right of the press to *obtain* the name of the rape victim or to attend criminal court proceedings concerning prosecutions for rape. The issue here concerns whether the press is free to truthfully publish all of the facts related to a prosecution which is open to the public, a matter of public record and subject to discussion within the community.[16]

II.

THIS COURT HAS JURISDICTION OF THE APPEAL

In the brief for the appellee and in the *amicus* brief filed by the State of Georgia, counsel have argued that the judgment of the Supreme Court of Georgia is not "final" as required by 28 U.S.C. §1257.[17] The State of Georgia also

14. A more extensive discussion of this point of rebuttal is contained in Section V(C) of this Reply Brief, p. 37, *infra*.

15. GA. CODE ANN. §§24A-1801 (c) and 24A-3501. See Brief of Appellee, p. 21n; Brief for the State of Georgia, pp. 21-22.

16. A more extensive discussion of this point of rebuttal is contained in Section VI of this Reply Brief, p. 39, *infra*.

17. Brief of Appellee, p. 5; Brief of the State of Georgia, p. 5.

suggests that 1968 Ga. Laws, pp. 1335, 1336 (Georgia Code Annotated §26-9901), which the Supreme Court of Georgia examined and expressly held constitutional in the present case, is only "tangentially involved" and, hence, will not support an appeal under 28 U.S.C. §1257(2).

The appellants would respectfully show this Court that both of these contentions are erroneous.

(A)

The Decision Of The Supreme Court Of Georgia Is "Final" For The Purpose Of Review Of The Federal Constitutional Issues Under 28 U.S.C. §1257.

The appellants respectfully submit that the Court's decisions in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), and *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974), control the question of "finality" under 28 U.S.C. §1257 in the present case.

The appellants continue to rely upon the authorities set forth in their original Brief, pages 24 through 30, which demonstrate that the requirement of "finality" is to be given a "practical rather than a technical construction."[18] The cases cited also clearly indicate this Court's pragmatic approach to the question of finality.[19]

18. Gillespie v. U. S. Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

19. Local 438 v. Curry, 371 U.S. 542 (1963); Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963); Mills v. Alabama, 384 U.S. 214 (1966); Rosenblatt v. American Cyanamid Company, 15 L.Ed.2d 39, 86 S.Ct. 1 (1965) (opinion of Mr. Justice Goldberg not reported in U.S. Reports); Brady v. Maryland, 373 U.S. 83 (1963); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

However, the appellants particularly wish to call the Court's attention to its recent decision in *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974), wherein this Court held that it had jurisdiction under 28 U.S.C. §1257 to review the decision of the Supreme Court of Florida upholding the constitutionality of a Florida statute requiring a newspaper to publish the reply of a political candidate who had been "assailed" in the paper. At the time this Court determined that it had jurisdiction, the Supreme Court of Florida had reversed a lower trial court ruling that the Florida statute unconstitutionally violated the First and Fourteenth Amendments and had remanded the case for trial. The newspaper appealed to the United States Supreme Court.

In *Tornillo*, as in the present case, this Court deferred the question of jurisdiction to the hearing of the case on the merits. 414 U.S. 1142 (1974). Following oral argument, this Court concluded that the judgment of the Supreme Court of Florida was "final" for the purposes of this Court's jurisdiction.

> "In North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Drug Stores*, the judgment of the Florida Supreme Court in this case is ripe for review by this Court." *Miami Herald Publishing Company* v. *Tornillo*, 94 S.Ct. at 2834.

The First Amendment values which influenced this Court's finding of finality in *Miami Herald Publishing Company* v. *Tornillo* are similarly present in this case.[20]

The uncertainty of the constitutional validity of Georgia Code Ann. §26-9901 restricts the present exercise of First Amendment rights. The constitutional uncertainty extends beyond the area of the prohibition of the statute, i.e., the name or identity of the female victim of a rape, and represents an invitation to the legislature to exercise the power sanctioned by the Supreme Court of Georgia to enact varying regulations as to the content of the press.[21]

The appellants respectfully submit that the Georgia statute prohibiting publication presents an urgency similar

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20. This Court in *Tornillo* noted:

"Both appellant and appellee claim that the uncertainty of the constitutional validity of [the Florida statute] restricts the present exercise of First Amendment rights. Brief for Appellant, at 41. Brief for Appellee, at 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the Florida statute] could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n. (1971)." Miami Herald Publishing Company v. Tornillo, 94 S.Ct. at 2834 n.6.

21. The State of Georgia goes so far as to submit:

". . . that it is entirely proper for the government, which is responsible to the people, to establish guidelines (subject, of course, to constitutional limitations) as what will and what will not be deemed to be a matter of legitimate public concern and interest—at least where the individual citizen's right to privacy is concerned. Government may do so, we submit, both through appropriate legislation or through judicial decisions." Brief of the State of Georgia, p. 20.

Appellants are also aware that at least one other state, North Carolina, has considered and is presently considering the enactment of legislation similar to Georgia Code Ann. §26-9901.

to the Florida statute requiring publication. The uneasy and unsettled constitutional posture of Georgia Code Ann. §26-9901 can only further impair the desired free and uninhibited operation of the press. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Miami Herald* v. *Tornillo*, 94 S.Ct. at 2834.

The issue in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), arose when the North Dakota Supreme Court struck a state statute requiring ownership of a pharmacy by registered pharmacists. The Supreme Court of North Dakota held that the statute violated the federal Constitution and remanded the case to the State Pharmacy Board to conduct an administrative hearing on the application to operate a pharmacy, *sans* the constitutional issue. This Court held that although there were state law questions to be considered on remand, the federal constitutional question was ripe for decision. 414 U.S. at 162.

Similarly, in the present case, the Georgia Supreme Court has decided the constitutional questions and has remanded the case for trial on the remaining issues of fact under state law. The Georgia Supreme Court has concluded that because of Georgia Code Ann. §26-9901, the appellants' publication in this case is not entitled to constitutional protection[22] and that the statute does not violate the First or Fourteenth Amendments to the Constitution.[23] Thus, as in *North Dakota State Board of Pharmacy*, the State Supreme Court has here remanded the case to the inferior state tribunal for decision solely on the basis of the applicable state law. No further consideration will be given to the federal constitutional questions

22. See Appendix to Jurisdictional Statement, A. 26.

23. See Appendix to Jurisdictional Statement, A. 26.

which have been finally decided by the State Supreme Court.

The appellee argues that upon remand of this case, the appellants may be successful in avoiding a judgment for damages and suggests that this would thereby render the constitutional decision of the Supreme Court of Georgia "moot."[24]

To the contrary, the judgment of the Supreme Court of Georgia has forever validated the Georgia statute (Ga. Code Ann. §26-9901) unless and until that decision is reviewed by this Court. Even if the appellants should prevail on the issues of state law in the lower court, they will continue to suffer under the inhibitions[25] of a state criminal statute which has been construed to limit the broadcast of truthful news accounts of public court proceedings.

If the appellants should suffer a money judgment in this case, a review of the application of the state law to the facts in this case would not in any manner alter the federal constitutional questions, which have now been finally decided by the Georgia Supreme Court and which are now ripe for this Court's review.[26]

Accordingly, under the rationale set forth by the Court in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, and *Miami Herald Publishing Company* v. *Tornillo*, the decision of the Supreme Court of Georgia is final under 28 U.S.C. §1257.

24. Brief of Appellee, p. 8.

25. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

26. The appellee concedes that if the appellants' contentions in this Court are found to be meritorious, the entire case may be disposed of on the constitutional arguments. Brief of Appellee, p. 20.

(B)

The Decision Of The Supreme Court Of Georgia Is Properly Reviewable By Means Of An Appeal Under 28 U.S.C. §1257(2) Because Georgia Code Ann. §26-9901 Is Directly Drawn Into Question.

The State of Georgia suggests that the Georgia criminal statute, 1968 Ga. Laws, pp. 1335, 1336 (Georgia Code Ann. §26-9901), is only "tangentially involved" in this case because it reflects the state's public policy concerning the disclosure of the name or identity of a rape victim.[27] However, a reading of the decision of the Supreme Court of Georgia, together with the language of the Court's opinion denying the appellants' motion for rehearing, clearly reflects that the Georgia Supreme Court felt the statute was *directly* involved in the case, although the statute did not itself give rise to a civil cause of action.[28]

The appellants argued below that Georgia Code Ann. §26-9901 did not apply where the victim of the rape was dead at the time of the publication of the victim's name. Alternatively, the appellants argued that if the statute did apply to the conduct of the appellants, then the statute violated the First and Fourteenth Amendments to the Constitution of the United States.[29]

The Georgia Supreme Court in its second opinion expressly rejected the appellants' contentions and held that the 1968 Georgia statute was constitutional and directly involved in the case:

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27. Brief of the State of Georgia, p. 9.

28. "This Georgia statute and its predecessor . . . are penal in nature, and while these statutes establish the public policy of this state on this subject, neither of them created a civil cause of action for damages in favor of the victim or anyone else." Appendix to Jurisdictional Statement, A. 12.

29. Record, pp. 72, 111, 278, 282-83.

> "We hold that this 1968 Georgia statute is not unconstitutional, and *because of this statute* the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state"[30] (emphasis supplied).

III.

THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THE TRUTHFUL PUBLICATION OF MATTERS OF PUBLIC INTEREST

Although this Court has recently altered the scope of the constitutional protections afforded to false and defamatory publications,[31] it is a settled rule of constitutional law that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened concept of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.*" *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972) (emphasis supplied).

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30. Appendix to Jurisdictional Statement, A. 26.

31. Gertz v. Robert Welch, Inc., ... U.S. ....., 94 S.Ct. 2997 (1974). In *Gertz*, the Court limited the rule in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to those instances in which the false and defamatory publication concerns a public officer or a public figure. The appellant's analysis of the application of *Gertz* to the present case is set forth in this brief in footnote 44, p. 21, *infra*.

See also *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

Though the parties used slightly different words to describe the concept, this fundamental constitutional rule is agreed to be the controlling principle in the present suit by both parties and the *amicus curiae*.[32] The argument thus focuses on the following issues:

(1) The breadth of the constitutional protection afforded the broadcast of truthful matters of public interest;[33]

(2) Who is to decide whether or not a broadcast is constitutionally protected and privileged;[34]

(3) What role, if any, does Georgia Code Ann. §26-9901 have in that constitutional determination;[35] and

(4) Whether the broadcast of the name of a murder-rape victim in connection with the timely news coverage of the trial of those accused of the crimes

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32. The Brief of the Appellee concedes:

"Appellee has no quarrel with the decisions of this Court assuring that the First Amendment is not nibbled away and concedes that were the public identification in the news media of the name of the victim of a rape a legitimate matter of public concern, then Appellee's cause of action would fall—statute or no statute." Brief of Appellee, p. 20.

The Brief of the State of Georgia similarly concedes:

"The right to privacy, on the other hand, is also limited. One of the most important limitations is that it cannot be applied so as to prohibit the publication or broadcasting of matters *which are of legitimate public or general interest.*" Brief of the State of Georgia, pp. 18-19.

33. See discussion p. 18, *infra*.

34. See discussion p. 23, *infra*.

35. See discussion p. 39, *infra*.

was a matter of public interest or so "rationally related"[36] to the discussion of a subject of public interest as to be constitutionally protected?[37]

(A)

Truthful Factual Statements Are Constitutionally Protected

The appellants respectfully submit that the analysis in this case must begin with the clear articulation of the constitutional protections afforded *truthful* speech as distinguished from the protections afforded *false and defamatory* speech. *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974); *Pickering* v. *Board of Education of Township High School*, 391 U.S. 563, 570 (1968); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). At least since this Court's decision in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), upon which the appellee relies, the measure for the constitutional value of speech has been expressed in terms of whether the speech was "a step to truth."

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is*

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36. Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

37. See discussion p. 29, *infra*.

clearly outweighed by the social interest in order and morality." 315 U.S. at 571-72 (emphasis supplied).

The protection of the truthful statement has followed throughout the series of cases in which this Court has considered the protections afforded false speech. *E.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 383-84 (1967); *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974).

> ". . . there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007 (1974).

This Court has repeatedly held that the Constitution shields the truthful discussion from both civil and criminal sanctions:

> "*Truth* may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) (emphasis supplied).

See also, *Kois* v. *Wisconsin*, 408 U.S. 229, 230 (1972); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).

(B)

The Constitutional Protection Afforded Truthful Speech Extends To All Subjects And Issues Of Public Interest

The Constitution broadly protects the expression of all ideas and the discussion of all factual information necessary or appropriate to enable the members of society to

cope with the exigencies of their period. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). This Court has noted that there is no such thing as a false idea. *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974).

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007 (1974).

The decisions of this Court make it abundantly clear that the constitutional protection does not depend upon the "social utility" or "popularity" of the information.

> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, see *Winters* v. *New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

Nor is the scope of the constitutional protection limited to purely political expression or comment upon public affairs:

> "*The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.* One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. *The risk of the exposure is an essential*

incident of life in a society which places a primary value on freedom of speech and of press." Time, Inc. v. *Hill*, 385 U.S. 374, 388 (1967) (emphasis supplied).

The decisions of the courts throughout the nation reflect this national commitment to a broad and vigorous discussion of matters of public interest. Indeed, in *Time, Inc.* v. *Hill*, this Court cited twenty-two state decisions in which the courts had applied a "public interest" test in some form to preclude recovery for invasion of privacy. 385 U.S. at 383 n. 7. Some courts have spoken in terms of the "newsworthiness of the matter." *Sidis* v. *F-R Pub. Corp.*, 113 F.2d 806 (2nd Cir. 1940); *Cantrell* v. *Forest City Publishing Company*, 484 F.2d 150 (6th Cir. 1973), *cert. granted*, ... U.S. ..... (July 8, 1974). Some courts have held that the protection is extended on the basis of the interest of the public in a particular subject matter. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858, 862 (5th Cir. 1970).

The courts have broadly protected discussions of such subjects as public health,[38] organized crime,[39] the public accommodations available at the Masters Golf Tournament,[40] the opening of a play on Broadway,[41] the misfortune which befalls the victims of the collapse of a bridge,[42]

38. United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968).

39. Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970); Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D. Calif. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969).

40. Bon Air Hotel, Inc. v. Time, Inc., 295 F.Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970).

41. Time, Inc. v. Hill, 385 U.S. 374 (1967).

42. Cantrell v. Forest City Publishing Company, 484 F.2d 150 (6th Cir. 1973), *cert. granted*, ____ U.S. ____ (July 8, 1974).

the facts concerning the commission of various crimes and the subsequent prosecution of those accused.[43]

In an analogous case, *Edmiston* v. *Time, Inc.*, 257 F.Supp. 22 (S.D. N.Y. 1966), Judge Tyler dismissed plaintiff's claim for libel and invasion of privacy based upon the publication of a story to the effect that the plaintiff had voluntarily had sexual intercourse with a number of men. The Court found that the magazine article was a fair and true report of a state court opinion and that as such, it was a complete defense to the defendant's claim, both for libel and invasion of privacy. See also *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963).

Certainly, the scope of information needed and desired by the public with respect to the "exigencies of the period" extends far beyond the actions of public officials or persons who have thrust themselves to the forefront of public controversies.[44] Protection of truthful publications which con-

43. Bernstein v. National Broadcasting Company, 129 F.Supp. 817 (D.C. 1955), *aff'd*, 232 F.2d 369 (1956); Bremmer v. Journal-Tribune Company, 247 Iowa 817, 76 N.W.2d 762 (1956); Jenkins v. Dell Publishing Company, 251 F.2d 447 (3rd Cir. 1958); Jones v. Herald Post Company, 230 Ky. 227, 18 S.W.2d 972 (1929); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946); Miller v. National Broadcasting Company, 157 F.Supp. 240 (D.C. Del. 1957); Hillman v. Star Publishing Company, 64 Wash. 691, 117 P. 594 (1911).

44. In Gertz v. Robert Welch, Inc., ____ U.S. ____, 94 S.Ct. 2997 (1974), this Court limited the "strategic protection" afforded *false* speech by the rule in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to public officials and public figures. 94 S.Ct. 3010-3011. The Court's rationale in *Gertz* does not appear applicable to the present case because:

(1) truthful speech, as in this case, is entitled to greater constitutional protection than the false and defamatory speech in *Gertz;*

(2) the opportunity for "rebuttal," which this Court emphasized in *Gertz*, is immaterial here since "rebuttal" is not a remedy for truthful speech;

(Continued on following page)

cern only public officials or public figures would exclude information and discussion concerning a host of areas essential to the public, such as reports on the activities of organized crime,[45] private persons engaged in governmental or political corruption,[46] and publications concerning fraud on consumers.[47]

The courts have recognized that the broad Constitutional commitment to free speech and press and the concomitant requirement of a vigorous and uninhibited discussion of all matters of public interest include the broadest possible range of facts and topics. If, as this Court

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Footnote Continued—

(3) the "injury" to private reputation suffered in *Gertz* is objectively measurable within the community, while the "injury" to privacy is exclusively a product of the plaintiff's subjective personal feelings; and

(4) the substance of the defamatory statement in *Gertz* makes apparent the substantial danger to the reputation of the private individual. However, the publication of the truthful statement which was a matter of public record in the present case provides no similar warning that the statement will offend or invade the "privacy" of unknown private individuals.

There is no suggestion that the parents of the boys accused of the murder and rape in this case are any less "worthy" of protection than the parents of the victim. Yet the prosecution of this crime is no less a matter of public interest simply because none of the families "voluntarily" thrust themselves into the circumstances. *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

45. Cardillo v. Doubleday and Company, 366 F.Supp. 92 (S.D. N.Y. 1973); LaBruzzo v. Associated Press, 353 F.Supp. 979 (W.D. Mo. 1973); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Calif. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); Alpine Construction Company v. DeMaris, 358 F.Supp. 422 (N.D. Ill. 1973); Porter v. Guam Publications, Inc., 475 F.2d 744 (9th Cir. 1973).

46. Alexander v. Lancaster, 330 F.Supp. 341 (W.D. La. 1971).

47. Lewis v. Reader's Digest Association, Inc., 366 F.Supp. 154 (D. Mont. 1973) (quack cures for arthritis); Hensley v. Life Magazine, Time, Inc., 336 F.Supp. 50 (N.D. Calif. 1971); Spern v. Time, Inc., 324 F.Supp. 1201 (W.D. Pa. 1971) (mail order "ministers").

has held, it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which *truth* will ultimately prevail,[48] then the measure of the constitutional protections can be no less broadly defined. No sanction should be allowed for the publication of a truthful discussion or any fact rationally related to the discussion of matters of public interest.

IV.

THE CONSTITUTIONALLY PROTECTED FUNCTION OF EDITORS IN THE CHOICE OF MATERIAL AND TREATMENT OF PUBLIC ISSUES REQUIRES THAT THE EXERCISE OF THAT DISCRETION NOT BE PENALIZED

(A)

Freedom Of The Press Requires That The Editor Be Free To Choose What Shall Be Truthfully Published.

The language of the First Amendment[49] and the decisions of this Court[50] demonstrate that the historical purpose of the framers was to keep the government and, in particular, the legislative branch of the government, out of the editor's chair. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

> "For better or worse, editing is what editors are for; and editing is selection and choice of material." *Co-*

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48. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969).

49. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. Amend. I.

50. Miami Herald Publishing Co. v. Tornillo, ... U.S. ....., 94 S.Ct. 2831 (1974); Garrison v. Louisiana, 379 U.S. 64 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967).

lumbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 124 (1973).

The constitutional protection afforded truthful speech must be broad enough to preserve the editor's discretion to choose from among those subjects and facts which have any rational relationship to the broad range of matters which have been historically acknowledged as matters of public interest.[51]

> ". . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the *function of editors*. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The *choice of material* to go into a newspaper, and the *decisions made as to limitations* on the size of the paper, and *content*, and *treatment of public issues* and public officials—whether fair or unfair—*constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.*" *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. at ....., 94 S.Ct. at 2839, 2840 (emphasis supplied).

A press which must depend upon a governmental determination as to what facts are of "public interest" in order to avoid liability for their truthful publication is not free at all. It is difficult to imagine a concept more pernicious to the institution of a free press than a rule that the discretion of the editor to publish truthful and factual ac-

51. *See, e.g.*, cases cited Fns. 38-43, *supra*.

counts shall be gauged by the judgment of the legislature as to what facts are of "public interest."[52]

The public of this country is not an undifferentiated mass. The fabric of our contemporary society is woven from the diverse groups which collectively compose the "public." Issues of burning concern to one group may be of no concern at all to a group in a different location, of a different age, of a different religion, a different sex, of different employment, of different political persuasion, or simply of a different interest.[53] Thus, the constitutional importance of a publication cannot be measured simply by the breadth of its appeal or popularity.

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. *The line between the informing and the entertaining is too elusive for the protection of that basic right.* Everyone is familiar with instances of propaganda through fiction. *What is one man's amusement, teaches another's doctrine.* Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters* v. *New York*, 333 U.S. 507, 510 (1948) (emphasis added).

A great diversity of facts and views is necessary for the operation of the "marketplace of ideas." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3007; *New York Times Company* v. *Sullivan*, 376 U.S. 254, 270 (1964).

52. It is upon this premise that the Georgia Supreme Court held that the appellants' publication was not entitled to the protection of the First and Fourteenth Amendments. Appendix to Jurisdictional Statement, A. 25, 26.

53. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948).

The editor is not in a position to determine whether or not his publication will invade what any single viewer or reader deems to be his "privacy."[54] The editor is responsible for exercising the appropriate constitutional standard of care in ascertaining that the facts he publishes are accurate. *Gertz* v. *Robert Welch, Inc., supra.* However, the resources available to the editor to check the objective truth of his statements (*e.g.*, the reliability of the sources, the existence of corroborating public records or testimony, etc.) are not available to the publisher to determine whether someone will subjectively find the publication "highly offensive."

The institution of a free press requires the protection of the constitutional function of editors from the recognized potential of a jury exercising its discretion to punish the expression of unpopular views. *Winters* v. *New York*, 333 U.S. 507 (1948); *Time, Inc.* v. *Hill*, 385 U.S. 374, 406 (1967) (Harlan, J.)

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz* v. *Robert Welch, Inc.*, ... U.S. at ....., 94 S.Ct. at 3012.

The protection afforded the editor must not be limited to immunity from damages only when he truthfully pub-

54. *E.g.*, under the broad civil action for invasion of privacy recognized by the Georgia Court in this case, it would be possible for a relative of a victim to claim an invasion of privacy from the broadcast of an interview to which the victim had consented.

lishes what a jury, the legislature or even a judge[55] agrees is a matter of "public interest." Such a rule would permit a substitution of the judgment of the jury, aided by hindsight and time for full deliberation, for the judgment which the editor must make under the limitations of the newsroom environment.

Accordingly, freedom of the press requires that the editor be free to determine what subjects, issues, and facts are of public interest in the context of his audience. As long as his publication is truthful, the editor's determination as to the public interest should be reviewable, if at all, only for clear abuse of his constitutional discretion. *Miami Herald Publishing Co.* v. *Tornillo*, ... U.S. at ....., 94 S.Ct. at 2839-40.

(B)

The Freedom Of The Press Requires Those Who Would Restrain Or Penalize Truthful Publications To Overcome The Presumption Of Unconstitutionality.

Any state-imposed burden upon the publication of truthful speech must first overcome the heavy constitutional presumption against its validity. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

> "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. . . . Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

55. This Court in *Gertz* expressed reservations about the wisdom of entrusting to the judiciary the task of determining what is of "public interest" on an *ad hoc* basis. Gertz v. Robert Welch, Inc., ... U.S. at ....., 94 S.Ct. at 3010.

Thus, the appellee must bear the substantial burden of overcoming this presumption and proving that the appellants' broadcast is not entitled to the protection of the First and Fourteenth Amendments. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

At the minimum, the appellee must demonstrate that the evils to the order and morality of our society are so grave and imperative and that the facts published, though truthful, are of no conceivable value to any segment of the public as a "step to truth" as to amount to a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest.[56]

This standard, as all other constitutional measures of the freedom of speech and press, must be applied in the first instance by the Court as a matter of law. *Miller* v. *California*, 413 U.S. 15, 25, 36 (1973); *Jenkins* v. *Georgia*, ... U.S. ....., 94 S.Ct. 2750 (1974); *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., 94 S.Ct. 2997 (1974); *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966). Only where the court concludes *as a matter of law* that the truthful publication complained of constitutes a clear abuse of the editor's constitutional discretion in the selection and treatment of material relating to matters of public interest can there be any jury issue as to the "offensiveness"[57] of the publication or whether the publication actually invaded the plaintiff's "zone of privacy."[58]

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56. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

57. The standards set forth by the Georgia Supreme Court in the instant case. Appendix to Jurisdictional Statement, A. 17.

58. *Id.*

Where, as here, the publication is truthful and concerns a public criminal prosecution, and the particular fact, i.e., the name of the victim of a murder-rape, is rationally related to the discussion of the prosecution and the circumstances of the crime and the punishment, the action against the news media and its reporter should be dismissed on motion as a matter of law.

V.

THE APPELLANTS' NEWS REPORT, INCLUDING THE PUBLICATION OF THE NAME OF THE VICTIM OF THE MURDER-RAPE, IS CONSTITUTIONALLY PROTECTED AS A MATTER OF PUBLIC INTEREST

(A)

The Publication Of The Name Of The Victim In This Case Was A Matter Of Public Interest Within The Constitutional Protection.

The appellee repeatedly complains that the appellants have failed to "articulate just how the utterance involved is of public or general concern"[59] and "frankly states that he has never heard from any source whatever a single logical reason suggested or proposed as to a positive value that would be served by publicly identifying the victim of a rape, whoever she might be."[60] The appellee has evi-

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59. Brief of Appellee, p. 20.

60. Brief of Appellee, p. 25.

dently overlooked the reasons and the supporting authority set forth by the appellants in their Brief.[61]

(1)

The Name Of The Victim Is Of Public Interest In Identifying The Particular Prosecution In Which Charges Have Been Dismissed And Pleas And Sentences Have Been Received.

As the appellee acknowledges, the rape and murder of Cynthia Cohn was a crime of substantial public interest within the community.[62] However, the prosecutions did not commence until some eight (8) months after the victim had died. Hence, those acquainted with Cynthia in the community, her classmates and friends, their parents, her teachers, her neighbors and others, already knew of her death and would have been interested in the termination of any prosecution as a result of her death.

61.

"The subject matter of [Ga. Code Ann. §26-9901], the name or identity of a rape victim is clearly related to the public's serious and legitimate interest in learning of the violations and enforcement of criminal law. In many instances, as here, the name of the victim can itself be a matter of public interest. Publication of the name or identity of a rape victim can serve the public interest in the tragedies which befall victims of crimes: in seeing that victims of crimes receive proper care and support; in facilitating the prosecution of criminal violations by identifying and securing possible prosecution and defense witnesses; and in assuring that the criminal processes in a particular case are proceeding without either subterfuge or harassment. Publication of the name of the victim of such a crime is certainly well within the broad definition of 'public interest' which has emerged in those cases dealing with the issue."

Brief of Appellants, pp. 17-18. See also Brief of Appellants, pp. 39-40.

62. Brief of Appellee, p. 2.

The public has a legitimate interest in knowing that those accused of the rape and murder of *Cindy Cohn* are being fully prosecuted and the public is entitled to know all the facts which surround the exercise of the prosecutor's discretion to drop the murder charge and recommend light sentences in this *particular* case.[63] Thus the use of the victim's name to identify the particular crime[64] under discussion to those who were familiar with the victim was of public interest.

(2)

The Publication Of The Name Of The Victim Was A Matter Of Interest In Connection With The Public's Understanding Of The Circumstances Of The Particular Crime.

The nature of the crime, the circumstances, the place and neighborhood where the crime was committed, the name, character and demeanor of both the attacker and the victim, together with any and all aggravating circum-

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63. Friendly and Goldfarb in their study, CRIME AND PUBLICITY, THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE (1967) (cited by the appellee in his Brief, p. 17), remark:

"That public scrutiny *of all phases of police and prosecution activity is essential should be obvious.*

. . .

. . . the apparatus of criminal justice in America . . . is pervaded by politics in its least attractive form. With some exceptions at the higher levels, most state and local judges are elected. Characteristically, so are the prosecuting attorneys and county sheriffs. At no other place in the political structure of the state or city or county are the temptations for political expedience, chicanery, and corruption so great, simply because at no place are the opportunities so voluminous and the scrutiny so difficult." *Ibid.* pp. 44-45 (emphasis added).

64. A practice not unknown to the Georgia courts. See Frank v. State, 141 Ga. 243, 247, 80 S.E. 1016, 1018 (1913), a murder case which also involved a sexual assault on the victim.

stances surrounding the crime, are facts important to the public's understanding of the commission of the crime and the prosecution of those accused of the crime.

All facts which tend to bear on the circumstances of the crime, including the identity of the victim, are relevant and important to the public's understanding of the crime. Identification of the victim provides information concerning the character of the victim in provoking or resisting the attack, any association or relationship between the victim and the attacker and the socio-economic information relating to the parties and the commission of the crime. Such information is essential for the public to make informed judgments as to the dangers to which they and their children are exposed and what actions are necessary for their protection.

In their study, *Crime and Publicity*, Friendly and Goldfarb conclude:

> ". . . [S]ome of the citizen's interest in crime springs from sordid if not psychopathic roots. *But some grows from the perfectly proper need to know what is happening in his community.* . . . The citizen has as much stake as the mayor in the peace and quiet of his street and . . . perhaps more stake than the cop on the beat in his and his family's personal safety.
>
> *Crime of almost any sort is a threat to him. He has a need to know about it, its detection, its prevention, its punishment.* He is not willing, being sensible as well as democratic, to turn the whole area over to the officials who have been designated to cope with the subject, and never watch what they do and how they do it. Nor should he be willing to. *Merely to know that a crime has occurred, that a suspect has been arrested and, many weeks or months later, found innocent or*

> *guilty, is not always enough to satisfy him.* Nor should it be.
>
> The people of a community that purports to be self-governing—the average man and the leading men—need news of crime in appropriate detail (*which often means abundant detail*) to satisfy their interest as persons and as citizens. *The personal interest is not ignoble per se; the civic interest is essential.*" Friendly and Goldfarb, *op. cit.*, p. 42 (emphasis added).

(3)

The Name Of The Victim Is A Matter Of Public Interest In Securing Witnesses For Both The Prosecution And The Defense.

The public has a legitimate interest in seeing that the criminal prosecution is conducted in a fair and vigorous manner. The name of the victim can be of great importance in the identification and procurement of unknown witnesses who may have information or evidence relevant to the case concerning the crime or important to either the prosecution or the defense.

> "There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life. Reports of these events may also promote the values served by the constitutional guarantee of a public trial. Although a case is not to be 'tried in the papers,' reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and

friends or relatives to come to the aid of the victim." *Briscoe* v. *Reader's Digest Association,* 4 Cal. 3d 529, ..., 483 P.2d 34, 39 (1971).

For example, by identifying the victim, a witness might recall that either the accused or the victim was seen in association with persons who might be able to furnish information concerning matters of provocation, enticement, consent, and the habits and the reputation of the victim. Likewise, disclosure of the name of the victim could be of assistance in securing eyewitness accounts of the activities of the attacker and the victim prior to the occurrence which might afford either corroborating testimony for the prosecution or exonerating testimony for the accused. Such information also forms the basis of the judgment of the court or jury as to any extenuating or mitigating circumstances with respect to the crime. Thus the use of the victim's name serves the public interest in advising potential witnesses who may be otherwise unknown or unaware of the prosecution to come forward for either the prosecution or the defense.

(B)

The Publication Of The Victim's Name Is Constitutionally Protected As A Truthful Fact Which Is Rationally Related To The Discussion Of A Matter Of Public Interest.

The name of the murder-rape victim when reported in connection with the other events of the crime and with the criminal proceedings surrounding the crime is a matter of public interest or rationally related to the discussion of a matter of public interest so as to be constitutionally protected.[65]

65. Kois v. Wisconsin, 408 U.S. 229 (1972). See also Brief of Appellants, pp. 60-65.

Significantly, the appellee does not argue that the news story concerning the criminal court proceeding was not a matter of public interest. Brief of Appellee, p. 20. The appellee does not contend that the publication of the name of the victim is not a fact rationally related to the news story which was broadcast.[66] Instead, the appellee argues that the publication of the name of the victim was a matter of "overpublication" by the news media. Brief of Appellee, p. 21.

> ". . . Is not the public's interest in factual news reporting *sufficiently* served by an account of the event itself without public identification of the person victimized." Brief of the Appellee, p. 20 (emphasis added).

Thus, the appellee's complaint is that the appellants published "too much"—not that the appellants published an extraneous private fact unrelated to the subject matter which was being discussed. Although the appellee characterizes this suit as dealing with the "public disclosure of embarrassing private facts,"[67] this argument appears strained in view of the conceded fact that the name of the victim was a matter of public record in the indictment and was part of the criminal prosecution.[68]

> ". . . *A trial is a public event.* What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. . . . *Those who see and hear what*

66. The appellee comments:

"The trite but accurate saying that 'names are news' is undeniable, but that is a commercial fact unrelated to the constitutional decision at stake." Brief of Appellee, p. 25.

67. Brief of Appellee, p. 10.

68. A. 23, 25.

> *transpired can report it with impunity.*" *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) (emphasis supplied).

However broad the concept of "public interest" may be in the abstract, it is clear that it encompasses the discussion of court proceedings and timely accounts of criminal activities.[69] A number of courts which have considered the question of the identification of victims of sexual assaults have concluded that the "public interest" in discussing the actions of state courts or in discussing the crime itself require the dismissal of claims for "invasion of privacy." *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *Edmiston* v. *Time, Inc.*, 257 F.Supp. 22 (S.D. N.Y. 1966); *Carlson* v. *Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962).

The appellants do not contend that the identity of *all* rape victims is necessarily a matter of public interest and to be published. But where, as here, the crime has resulted in a criminal prosecution and has become a matter of intense public interest, the editor must be free to exercise his judgment as to the "treatment" of the story and the choice of the "facts" related to the prosecution which he will include in his publication. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

As the appellants stated in their initial Brief (pp. 23, 60-65), the editor's privilege to publish truthful accounts of matters of public interest must include the right to publish all facts "rationally related" to the subject. *Kois* v.

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69. Time, Inc. v. Hill, 385 U.S. 374 (1967); Kois v. Wisconsin, 408 U.S. 229 (1972); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956).

Wisconsin, 408 U.S. 229 (1972). To hold, as the Supreme Court of Georgia has done in this case, that the editor's discretion to publish truthful factual accounts is subject to an *ex post facto* review for "offensiveness" by a jury will result in a substantial degree of "self-censorship."

The appellants respectfully submit that their news story concerning the prosecutions in the Fulton County Superior Court of the six defendants for the murder and rape of Cynthia Cohn, including the identification of the victim, was a matter of clear public interest or so rationally related to the discussion of a matter of public interest as to be entitled to the protection of the First and Fourteenth Amendments.[70]

(C)

The Publication Of The Victim's Name In The Present Case Does Not Defeat Any Of The "Social Values" Urged By Appellee To "Outweigh" The Freedom Of The Press.

An examination of the "competing social values" which the appellee argues "outweigh" the freedom of the press *in this case* discloses that neither of the ends allegedly served by the prohibition are achieved on the facts of this case. The appellee argues that the prohibition:

> (1) protects the victim from publicity and thereby encourages her to report and prosecute the crime; and

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70. Mr. Justice Powell in granting a stay of a state trial court order restraining news coverage of a murder-rape prosecution recently noted:

> "*Decisions of this Court repeatedly have recognized that trials are public events. And 'reporters . . . are plainly free to report whatever occurs in open court through their respective media.*" Times-Pickayune Publishing Corp. v. Schulingkamp, ... S.Ct. ....., 43 U.S.L.W. 2046 (Mr. Justice Powell, July 29, 1974) (emphasis added).

(2) assists the prosecution by assuring a willing victim-witness.[71]

Since Cynthia Cohn died at the time the crime was committed, the appellee's argument that the prohibition will serve to reduce the victim's fear of publicity and thereby encourage her to prosecute is, at best, specious.[72] The appellee's claim that this prosecution was impaired by the publication of the victim's name ignores the fact that *prior* to the publication, the prosecution *dropped* the murder charges against *all* defendants and recommended light 5 year sentences for *all* defendants on their guilty pleas to the rape charges. The only case subsequently prosecuted arose where one of the defendants, unhappy with a jail sentence, sought to withdraw his guilty plea.[73]

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71. ". . . reporting a rape has such unpleasant ramifications for the victim—both because of her reputation and the necessary caution of the police in accepting those charges—that rapes too frequently go unreported. The response, it is submitted, must not only be legislative, judicial and attitude changes, but also to find a way, consistent with the *Constitution*, to reduce the reluctance of rape victims and/or their families to report the crime and testify in court." Brief of Appellee, p. 16.

"That the avoidance or reduction of publicity will aid law enforcement is axiomatic because the fear of publicity seriously interferes with effective law enforcement." Brief of Appellee, p. 17.

72. The appellee acknowledges that there is a paucity of studies on rape. Brief of Appellee, p. 14. The studies cited by the appellee do not differentiate between the rape victim's general fear of publicity arising out of court appearances, police interrogation, confessions to parents and close friends and general news coverage of criminal prosecutions. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973); Goldner, *Rape as a Heinous But Understudied Offense*, 63 J. CRIM. L.C. & P.S. 402 (1972).

73. Newsman Wassell reported:

"Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family

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Thus, on the facts of this case the publication of the victim's name did not impair either of the two "social values" which the appellee belabors, but was instead clearly important to the public's understanding of the criminal court proceedings.

VI.

GEORGIA CODE ANN. §26-9901 UNCONSTITUTIONALLY ABRIDGES THE FREEDOM OF PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

The arguments presented by both the appellee and the State of Georgia fail to demonstrate how the Georgia statute, Ga. Code Ann. §26-9901, can be rescued from its apparent overbreadth. See Brief of Appellants, pp. 41-43. Neither the appellee nor the State of Georgia suggests how the Georgia statute, which broadly prohibits the publication of the victim's name in *all* circumstances, can be reconciled with the balancing of factors which they claim is required on a case-by-case basis.[74]

Footnote Continued—

felt that a lenient 5 year sentence would serve justice and he recommended a five year sentence.

. . .

"Joe Adam Thompson. His attorney Charles Weltner said Thompson would plead guilty to attempted rape. The Judge sentenced Thompson to 2 years with three months to serve. Weltner did not believe Thompson should have received a jail term because he did not actually commit rape and cooperated with the authorities. Thompson then changed his plea from guilty . . . and asked for a trial by Jury.

"Judge McKenzie said he knows the parents of the Thompson boy and would be glad to disqualify himself from the jury trial. Then upon a request by Weltner, Judge McKenzie said he would." A. 20, 21.

74. Brief of Appellee, p. 28; Brief for the State of Georgia, p. 13.

In support of the Georgia criminal statute, the State of Georgia submits:

> ". . . that it is *entirely proper* for the *government*, which is responsible to the people to *establish guidelines* (subject, of course, to constitutional limitations) *as what will and what will not be deemed to be a matter of legitimate public concern and interest*—at least where the individual citizen's right of privacy is concerned." Brief for the State of Georgia, p. 20 (emphasis supplied).

The State of Georgia cites no authority for this astounding proposition which clearly contravenes this Court's recent holding that the First Amendment protects the "function of editors" with respect to the choice of material to be published from governmental intrusion. *Miami Herald Publishing Company* v. *Tornillo*, ... U.S. ....., 94 S.Ct. 2831 (1974).

> "The choice of material to go into a newspaper, and the decisions made as to the limitations of the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. *It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.*" ..... U.S. at ....., 94 S.Ct. at 2840 (emphasis added).

The State of Georgia cites *Pickering* v. *Board of Education of Township High School*, 391 U.S. 563 (1968), in support of its argument that this Court has recognized that protected speech may be overbalanced by the state's interest.[75] However, in *Pickering*, this Court expressly rejected the State's contention that it could take disciplinary action against a teacher for truthful comments on matters of public concern:

> "Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it." 391 U.S., at 570.

The appellee also attempts to justify the Georgia criminal statute by comparing it with the statutes which provide for the confidentiality of juvenile court proceedings and records.[76] However, there is no issue in this case concerning the right of the press to *obtain the name of the rape victim* or to *attend criminal court proceedings* concerning prosecutions for rape. The issue in this case concerns whether or not the press is free to discuss truthfully and accurately all of the relevant and related facts concerning criminal court prosecutions which are in fact open to the public,[77] a matter of public record,[78] and the subject of public discussion within the community.[79]

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75. Brief for the State of Georgia, p. 17.

76. See Brief of Appellee, p. 21n.; Brief for the State of Georgia, pp. 21-22.

77. A. 19, 34.

78. A. 22-25.

79. This Court has distinguished the constitutional right of the press to *obtain access* to information from the right of the press to *publish* the information once obtained. Pell v. Procunier, ... U.S. ....., 41 L.Ed.2d 495 (June 24, 1974); Branzburg v. Hayes, 408 U.S. 665 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971).

> "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the

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The juvenile court statutes[80] do not prohibit publication of public records and matters of public interest. The statutes exclude the *public* and the *press* from access to the court's records and proceedings. Thus, the arguments advanced by the appellee with respect to the protection afforded the juvenile court records are wholly inapplicable to this case.

The Supreme Court of Georgia held Georgia Code Ann. §26-9901 to be constitutional.[81] That Court concluded that because of this statute, the publication of the name of the deceased victim in the present case was not a matter

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Footnote Continued—

public generally." Pell v. Procunier, ... U.S. at ....., 41 L.Ed.2d at 508.

However, the rule sought by the appellee in this case would bar the press from publishing facts to which the public does have access and which the public is free to discuss.

80. Georgia Code Ann. §24A-1801(c) provides:

"The general public shall be excluded from hearings involving delinquency, deprivation or unruliness. Only the parties, their counsel, witnesses, and other persons accompanying a party for his assistance, and any other persons as the court finds have a proper interest in the proceeding or in the work of the court may be admitted by the court. The court may temporarily exclude the child from the hearing except while allegations of his delinquency or unruly conduct are being heard."

Similarly, the files and records of the Court are held to be confidential from the public and the press:

"Section 24A-3501. Inspection of court files and records.

"Except in cases arising under §24A-3101, and subject to the requirements of §24A-2201(d), all files and records of the court in a proceeding under this Code [Title 24A] are open to inspection only upon order of the court. The judge may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and distribution the judge may deem proper, and may punish by contempt any violation of those conditions."

81. Appendix to Jurisdictional Statement, A-26.

of public interest and general concern and, hence, was unprotected by the First and Fourteenth Amendments.[82] The statute broadly prohibits the publication of the victim's name in *all* circumstances and applies even though the name is both a matter of public record and public interest. The statute clearly invades the function of editors and impairs the freedom of the press to publish truthful and factual information of or related to a matter of public interest.

VII.

CONCLUSION

Appellants respectfully submit that this Court has jurisdiction to review the final judgment of the Supreme Court of Georgia in this case holding that because of Georgia Code Ann. §26-9901, the appellants' truthful publication of the name of the deceased victim of the rape-murder in connection with their news coverage of the criminal prosecution was unprotected by the First Amendment.

The appellants urge the Court to find that Georgia Code Ann. §26-9901 unconstitutionally restricts the appellants' freedom of speech and of the press. The rule which the appellee and the State of Georgia urge this Court to apply would force a publisher or editor to determine at the risk of civil damages whether a jury, in retrospect, might view the publication of a truthful fact of public interest or one related to a matter of public interest as "highly offensive."

Such a rule would make the press understandably reluctant to publish facts which, although demonstrably true, might offend any one person in the readership or audience. Such a rule would reduce the scope and depth of news

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82. Appendix to Jurisdictional Statement, A. 25-26.

coverage and would constrict the information now available and needed by the public to test the ideas and beliefs competing in the "marketplace." Such a burden on the historically recognized need for full and robust discussion of matters of public affairs and public interest clearly violates the guarantees of a free press as they have evolved to this time.[83]

The appellants respectfully submit that the First and Fourteenth Amendments to the Constitution of the United States require this Court to reject the appellee's suggestion that a claim of "privacy" can be used to stifle or impair the truthful discussion of public affairs, public proceedings, or matters of public interest. The judgment of the Supreme Court of Georgia to the contrary is erroneous and should be reversed with directions to dismiss the case against the appellants.

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83. Miami Herald Publishing Co. v. Tornillo, ____ U.S. at ____, 94 S.Ct. at 2840; Time, Inc. v. Hill, 385 U.S. at 388-89; New York Times Co. v. Sullivan, 376 U.S. at 270; Thornhill v. Alabama, 310 U.S. at 101-102.